

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LARRY GENE HEGGEM,

Plaintiff,

v.

DR. SMITH, JO ELLA PHILLIPS, and
DONALD HOLBROOK,

Defendants.

NO: 4:15-CV-5092-TOR

ORDER DENYING PLAINTIFF'S
MISCELLANEOUS MOTIONS FOR
RELIEF

BEFORE THE COURT are the following motions: (1) Plaintiff's Urgent Request for Court to Believe Him and File His Complaint to Save His Life (ECF No. 20); (2) Plaintiff's Request for Appointment of Counsel (ECF No. 21); (3) Plaintiff's Prayer for Relief (ECF No. 22); (4) Plaintiff's Order to Show Cause for a Preliminary Injunction and a Temporary Restraining Order (ECF No. 29); (5) Plaintiff's Request for the Court to Consider Defendant's Answer to His Complaint as a Motion for Summary Judgment and to Deny It (ECF No. 31); (6) Plaintiff Has Shown Sufficient Evidence of Cause for a Preliminary Injunction (ECF No. 34); (7) Plaintiff's Request for a Court Order of a Physical Examination and Blood

1 Tests (ECF Nos. 41); and (8) Plaintiff's Request for Additional Injunction Relief of
2 Immediate Placement in Prisons Infirmary/And Update on Hep C Treatment Issue
3 (ECF No. 47). These matters were submitted for consideration without oral
4 argument. This Court—having reviewed the briefing, the record, and files
5 therein—is fully informed.

6 **BACKGROUND**

7 Plaintiff Larry Heggem, currently incarcerated at the Washington State
8 Penitentiary in Walla, Walla, Washington, commenced this suit on September 10,
9 2015. ECF No. 1. After ordering Plaintiff to show cause why he should be
10 permitted to proceed *in forma pauperis* in light of his prior litigation history, which
11 includes four “strikes” under 28 U.S.C. § 1915(g), this Court allowed Plaintiff to
12 file an Amended Complaint, which was served upon Defendants in December
13 2015. ECF Nos. 16, 18. In his Amended Complaint, Plaintiff asserts, *inter alia*,
14 that he is being denied medical treatment in violation of his Eighth Amendment
15 rights. ECF No. 17.

16 Plaintiff has filed a litany of motions, which this Court construes as the
17 following: requests that the Court (1) file Plaintiff's complaint, (2) appoint Plaintiff
18 counsel, (3) grant Plaintiff preliminary injunctive relief, (4) order medical
19 examinations of Plaintiff, and (5) construe Defendants' Answer as a Motion for
20 Summary Judgment and deny it. *See* ECF Nos. 20, 21, 22, 29, 31, 34, 41, 47.

DISCUSSION

A. Request to File Complaint

To the extent Plaintiff is asking this Court to file his complaint, *see* ECF No. 2, this request is denied as moot. Plaintiff's Amended Complaint was docketed on December 18, 2015. ECF Nos. 17; 22 at 10-11.¹

B. Request for Appointment of Counsel

Generally, a person has no right to counsel in civil actions. However, the court has discretion to designate counsel pursuant to 28 U.S.C. § 1915(e)(1) under "exceptional circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). "When determining whether 'exceptional circumstances' exist, a court must consider 'the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal

¹ To the extent Plaintiff is attempting to add additional claims or otherwise amend his Amended Complaint, *see* ECF Nos. 21 at 2-4 (asking the Court to treat his case under the American Disabilities Act); 35 at 4 (discussing his first amendment rights), such an amendment is accomplished by seeking leave to amend under Federal Rule of Civil Procedure 15. *See United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (explaining amendment standard).

1 issues involved.” *Id.* (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir.
2 1983)).

3 Here, Plaintiff has failed to demonstrate exceptional circumstances to
4 warrant appointment of counsel. Based on the filings before this Court, this Court
5 finds Plaintiff has demonstrated a reasonable ability to articulate his claims and
6 there is nothing particularly complex about the factual and legal issues presented in
7 the Amended Complaint. Further, based on the evidence currently before this
8 Court, the likelihood of success on the merits is minimal. Accordingly, Plaintiffs’
9 request for counsel (ECF No. 21) is denied.

10 **C. Request for a Preliminary Injunction or Temporary Restraining**
11 **Order**

12 The Prison Litigation Reform Act provides that “[p]reliminary injunctive
13 relief must be narrowly drawn, extend no further than necessary to correct the
14 harm the court finds requires preliminary relief, and be the least intrusive means
15 necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). These standards also apply
16 to prospective relief. *Id.* § 3626(a)(1). Further, the court must “give substantial
17 weight to any adverse impact on public safety or the operation of a criminal justice
18 system caused by the preliminary relief and shall respect the principles of comity .
19 . . in tailoring any preliminary relief.” *Id.* § 3626(a)(2); *see Gilmore v. California*,
20 220 F.3d 987, 999 (9th Cir. 2000) (“Section 3626(a) . . . operates simultaneously to

1 restrict the equity jurisdiction of federal courts and to protect the bargaining power
2 of prison administrators—no longer may courts grant or approve relief that binds
3 prison administrators to do more than the constitutional minimum.”).

4 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court may
5 grant preliminary injunctive relief or a temporary restraining order. Fed.R.Civ.P.
6 65(b). The analysis for granting a temporary restraining order is “substantially
7 identical” to that for a preliminary injunction. *Stuhlbarg Int’l Sales Co., Inc. v.*
8 *John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). It “is an
9 extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council,*
10 *Inc.*, 555 U.S. 7, 24 (2008). To obtain this relief, a plaintiff must establish that (1)
11 “he is likely to succeed on the merits,” (2) “he is likely to suffer irreparable harm
12 in the absence of preliminary relief,” (3) “the balance of equities tips in his favor,”
13 and (4) “an injunction is in the public interest.” *Id.* at 20. Plaintiff must satisfy each
14 element; however, a stronger showing of one element may offset a weaker showing
15 of another. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (“We have also
16 articulated an alternate formulation of the *Winter* test, under which serious
17 questions going to the merits and a balance of hardships that tips sharply towards
18 the plaintiff can support issuance of a preliminary injunction, so long as the
19 plaintiff also shows that there is a likelihood of irreparable injury and that the
20 injunction is in the public interest.” (internal quotation marks omitted)).

1 Plaintiff's Amended Complaint alleges that Defendants have violated his
2 Eighth Amendment rights by providing inadequate medical care. "The government
3 has an 'obligation to provide medical care for those whom it is punishing by
4 incarceration,' and failure to meet that obligation can constitute an Eighth
5 Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 763 F.3d
6 1060, 1066 (9th Cir. 2014) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103-05
7 (1976)). "In order to prevail on an Eighth Amendment claim for inadequate
8 medical care, a plaintiff must show 'deliberate indifference' to his 'serious medical
9 needs.'" *Id.* Importantly, mere negligence, difference of opinion, or malpractice,
10 are insufficient to establish a violation of the Eighth Amendment. *Estelle*, 429 U.S.
11 at 106. "Rather, to show deliberate indifference, the plaintiff must show that the
12 course of treatment the doctors chose was medically unacceptable under the
13 circumstances and that the defendants chose this course in conscious disregard of
14 an excessive risk to plaintiff's health." *Colwell*, 763 F.3d at 1068 (internal
15 quotation marks and alterations omitted).

16 Here, Plaintiff's motion fails, primarily because he has not demonstrated
17 likely success on the merits or that the balance of hardships tips in his favor.
18 Plaintiff's presented filings merely restate his concerns about his medical issues
19 and the care he is receiving while in custody. Among the relief requested, Plaintiff
20 asserts that he requires several ultrasounds of various parts of his upper body; an

1 MRI of his left shoulder socket, shoulder blade, neck, and lower spine; a liver
2 biopsy; a gluten-free diet; opiate pain medication; and Hepatitis C treatment.²
3 However, Plaintiff fails to provide anything, beyond his allegations, to show that
4 the medical care provided by Defendants constitutes deliberate indifference to his
5 serious medical needs—the grievances and medical documents submitted by
6 Plaintiff in support of his motions do not demonstrate constitutionally deficient
7 medical care warranting a preliminary injunction. Plaintiff’s filings demonstrate
8 that he merely disagrees with his providers about the proper course of his medical
9 treatment and which treatment is necessary. Based on the evidence before this
10 Court, this Court finds Plaintiff has failed to establish the necessity of a
11 preliminary injunction at this time. Accordingly, Plaintiff’s numerous requests for
12 preliminary injunctive relief (ECF No. 22, 29, 34, 35, 47) are denied.³

14 ² Pursuant to Plaintiff’s most recent filing, it appears he has been approved for the
15 new Hepatitis C treatment. *See* ECF No. 47 at 2.

16 ³ Plaintiff requests that this Court take judicial notice of his life threatening
17 circumstances. ECF No. 29 at 43. “The court may judicially notice a fact that is not
18 subject to reasonable dispute because it: (1) is generally known within the trial
19 court’s territorial jurisdiction; or (2) can be accurately and readily determined from
20 sources whose accuracy cannot reasonable be questioned.” Fed. R. Evid. 201(b).

1 **D. Request for Medical Examinations**

2 Pursuant to Federal Rule of Civil Procedure 35, a court may order a mental
3 or physical examination:

4 The court where the action is pending may order a party whose mental
5 or physical condition—including blood group—is in controversy to
6 submit to a physical or mental examination by a suitably licensed or
7 certified examiner. The court has the same authority to order a party
8 to produce for examination a person who is in its custody or under its
9 legal control.

10 Fed. R. Civ. P. 35(a)(1). Such an order “may be made only on motion for good
11 cause and on notice to all parties and the person to be examined.” *Id.* at (a)(2).

12 This Court denies Plaintiff’s request to order physical examinations and
13 blood tests. Rule 35 “does not allow for a physical examination of oneself.” *Berg v.*
14 *Prison Health Servs.*, 376 Fed. App’x 723, 724 (9th Cir. 2010); *see also Green v.*
15 *Branson*, 108 F.3d 1296, 1304 (10th Cir. 1997) (upholding district court’s denial of
16 an inmate’s Rule 35 motion for an examination of himself where inmate’s primary
17 purpose was to obtain medical care and to complain of deliberate indifference to
18 his serious medical needs). Accordingly, Plaintiff’s motion (ECF No. 41) is denied.

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Plaintiff’s request is denied—this Court cannot take judicial notice of his alleged
life-threatening circumstances.

1 **E. Request Regarding Defendants' Answer**

2 This Court denies Plaintiff's request that this Court construe Defendants'
3 Answer as a summary judgment motion and deny it. *See* ECF No. 31. Pursuant to
4 the Federal Rules of Civil Procedure, a defendant is required to file a responsive
5 pleading or a Rule 12(b) motion within a certain period after service of the
6 complaint and summons. *See* Fed. R. Civ. P. 12. While a party may file a motion to
7 dismiss, which, like a summary judgment motion, can be dispositive, Defendants
8 have not done so. This Court finds no basis to construe their filing other than what
9 it is: a responsive pleading. Accordingly, Plaintiff's motion (ECF No. 31) is
10 denied.

11 **F. Conclusion**

12 For the foregoing reasons, Plaintiff's various motions for miscellaneous
13 relief are denied. Plaintiff is, once again, reminded that a civil rights action is not
14 an open forum in which he may present all his grievances and complaints to the
15 Court. Plaintiff is also reminded to refrain from writing in the margins of any
16 future documents he submits to the Court and to cease filing superfluous
17 documents, including repeated submissions of the same document.

18 **ACCORDINGLY, IT IS ORDERED:**

19 1. Plaintiff's Urgent Request for Court to Believe Him and File His
20 Complaint to Save His Life (ECF No. 20) is **DENIED**.

2. Plaintiff's Request for Appointment of Counsel (ECF No. 21) is
DENIED.

3. Plaintiff's Prayer for Relief (ECF No. 22) is **DENIED.**

4. Plaintiff's Order to Show Cause for a Preliminary Injunction and a
Temporary Restraining Order (ECF Nos. 29) is **DENIED.**

5. Plaintiff's Request for the Court to Consider Defendant's Answer to His
Complaint as a Motion for Summary Judgment and to Deny It (ECF No. 31) is
DENIED.

6. Plaintiff's pleading entitled, "Plaintiff Has Shown Sufficient Evidence of
Cause for a Preliminary Injunction" (ECF No. 34) is **DENIED.**

7. Plaintiff's Request for a Court Order of a Physical Examination and
Blood Tests and Supplement (ECF No. 41) is **DENIED.**

8. Plaintiff's Request for Additional Injunction Relief of Immediate
Placement in Prisons Infirmary/And Update on Hep C Treatment Issue (ECF No.
47) is **DENIED.**

The District Court Executive is directed to enter this Order and provide
copies to the parties.

DATED March 3, 2016.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge